2016

Everett P. Wilson Jr. And Darla Wilson, Appellees/Respondents, and Educators Mutual Insurance Association Appellant/Petitioner, vs. Cade M. Krueger, Defendant

Utah Supreme Court

IN THE UTAH SUPREME COURT

EVERETT P. WILSON JR. and DARLA WILSON, Appellees/Respondents, and EDUCATORS MUTUAL INSURANCE ASSOCIATION Appellant/Petitioner, vs. CADE M. KRUEGER, Defendant	Utah Supreme Court Case No. 20160227-SC Utah Court of Appeals Case No. 20150150-CA Fourth Judicial District Court Case No. 110400083

REPLY BRIEF OF APPELLANT/PETITIONER

FROM THE UTAH COURT OF APPEALS' FEBRUARY 25, 2016 RULING REVERSING THE FINAL DECISION OF THE UTAH FOURTH JUDICIAL DISTRICT COURT

Jack C. Helgesen (1451)
Craig Helgesen (12547)
Helgesen, Houtz & Jones, P.C.
1531 Hill Field Road #3
Layton, Utah 84015
Telephone: (801) 544-5306
Facsimile: (801) 628-8328
(Attorneys for Appellees/Respondents)

Thomas M. Regan (9642)
Leslie A. Hulburt (12089)
Cozen O'Connor
510 West Broadway, Suite 1610
San Diego, California 92101
Telephone: (619) 234-1700
(Attorneys for Amicus Curiae)

Randall R. Smart (2983)
Jeffrey A. Callister (9963)
Chad P. Curtis (15829)
Smart, Schofield, Shorter &Lunceford
A Professional Corporation
5320 South 900 East, Suite 120
Salt Lake City, Utah 84117
Telephone: (801) 747-0647
Facsimile: (801) 747-1049
(Attorneys for Appellant/Petitioner)

IN THE UTAH SUPREME COURT

EVERETT P. WILSON JR. and DARLA WILSON, Appellees/Respondents, and EDUCATORS MUTUAL INSURANCE ASSOCIATION Appellant/Petitioner, vs. CADE M. KRUEGER, Defendant	Utah Supreme Court Case No. 20160227-SC Utah Court of Appeals Case No. 20150150-CA Fourth Judicial District Court Case No. 110400083

REPLY BRIEF OF APPELLANT/PETITIONER

FROM THE UTAH COURT OF APPEALS' FEBRUARY 25, 2016 RULING
REVERSING THE FINAL DECISION OF THE
UTAH FOURTH JUDICIAL DISTRICT COURT

Jack C. Helgesen (1451)
Craig Helgesen (12547)
Helgesen, Houtz & Jones, P.C.
1531 Hill Field Road #3
Layton, Utah 84015
Telephone: (801) 544-5306
Facsimile: (801) 628-8328
(Attorneys for Appellees/Respondents)

Thomas M. Regan (9642)
Leslie A. Hulburt (12089)
Cozen O'Connor
510 West Broadway, Suite 1610
San Diego, California 92101
Telephone: (619) 234-1700
(Attorneys for Amicus Curiae)

Randall R. Smart (2983)
Jeffrey A. Callister (9963)
Chad P. Curtis (15829)
Smart, Schofield, Shorter &Lunceford
A Professional Corporation
5320 South 900 East, Suite 120
Salt Lake City, Utah 84117
Telephone: (801) 747-0647
Facsimile: (801) 747-1049
(Attorneys for Appellant/Petitioner)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

SECONDARY SOURCES

I. UTAH COMMON LAW ALLOWS AN INSURER TO BRING A SUBROGATION ACTION IN ITS OWN NAME. WILSONS' ARGUMENTS TO THE CONTRARY ARE NOT CONVINCING.

In its opinion, after interpreting § 31A-21-108, the Utah Court of Appeals stated, "Our review of Utah case law convinces us that . . . no independent right exists for an insurer to seek subrogated damages in its own name." *Wilson v. Educators Mut. Ins. Ass'n.*, 2016 UT App 38, ¶ 8, 368 P.3d 471. The court of appeals went on to hold Utah law does not permit a subrogating insurer to file a subrogation action in its own name and thus, EMIA's claim should be dismissed. *Id.* ¶¶ 12–13. In its brief to the supreme court, EMIA presented several subrogation cases in which an insurer did sue in its own name to demonstrate that the court of appeals' interpretation of § 31A-21-108 was incorrect and that insurance companies do have a common law right to sue in their own names when subrogating. Br. of Appellant ("EMIA's Br.") at 9–23. Wilsons argue the court of appeals correctly interpreted § 31A-21-108, and then attempt to distinguish the cases presented by EMIA by claiming the cases are exceptions to the general rule that a subrogating insurer cannot sue in its own name. Br. of Appellee ("Wilsons' Br.") at 7–16.

While Wilsons' position is untenable, even if the Wilsons are correct, their position would support reversing the decision of the court of appeals. Wilsons acknowledge that Utah law allows an insurer to bring a subrogation action in its own name in several instances, contrary to the court of appeals' decision, but then claim these instances are no more than exceptions. *Id.* Specifically, Wilsons argue Utah law has established special rules allowing an insurer to bring a subrogation action in its own name in the following four areas: (1) property damage cases; (2) when the insured has been

made whole; (3) worker's compensation cases; and (4) when an insurer sues another insurer. *Id.* Wilsons argue Utah law specifically limits an insurer's right to bring subrogation actions to cases where at least one of the above four categories are present. This is not the case nor was it the rule articulated by the court of appeals. In reality, rather than exceptions, the cases cited clearly illustrate and support the general proposition that an insurer can bring a subrogation action in its own name and that the court of appeals' interpretation of § 31A-21-108 was incorrect. Each of the four categories proposed by the Wilsons will be discussed in turn.

A. UTAH COMMON LAW ALLOWS AN INSURER TO BRING A SUBROGATION ACTION IN ITS OWN NAME TO RECOUP MEDICAL EXPENSES.

Wilsons acknowledge Utah common law allows an insurer to bring a subrogation action in its own name for property damage claims, but then argue that under Utah common law, EMIA cannot subrogate to recoup medical expenses because those expenses are associated with personal injury damages. Wilsons' Br. at 8–9. Wilsons' proposition is incorrect.

Wilsons wrongly cite to *Johanson v. Cudahy Packing Co.*, 152 P.2d 98 (Utah 1944). Wilsons' Br. at 8–9. As EMIA discussed in its Brief of Appellant, this particular portion of *Johanson* cited by Wilsons was a review of other jurisdiction's laws that the *Johanson* Court expressly rejected. EMIA's Br. at 17–20. Furthermore, the Utah Supreme Court has since specifically acknowledged an insurer's right, under common law, to bring a subrogation action for medical expenses in *State Farm Mutual Insurance Co. v. Farmers Insurance Exchange*, 450 P.2d 458 (Utah 1969) ("*State Farm I*").

In *State Farm I* a similar argument as the Wilsons' was raised. *See State Farm Mut. Ins. Co. v. Farmers Ins. Exch.*, 493 P.2d 1002, 1002–03 (1972) ("*State Farm II*") (setting forth factual background and arguments raised in *State Farm I*). Specifically, the tortfeasor's insurer in *State Farm I* argued subrogation is a form of assignment and, under common law, assignment of personal injury claims was not allowed, so therefore the insurer could not bring its subrogation action. *See State Farm I*, 450 P.2d at 459. The Utah Supreme Court rejected this argument, holding an insurer has the right to bring subrogation claims against a tortfeasor with respect to medical expenses according to the insurer's insurance policy with its insured. *Id.* It is also important to note the subrogating insurer in *State Farm I* sued in its own name.

Similarly, in the present matter EMIA is seeking subrogation regarding the medical expenses it paid in behalf of its insured. In accordance with *State Farm I* EMIA has the right to file its action against the tortfeasor and do so in its own name. The common law right to do so has been part of Utah law since at least 1969.

B. THE MADE WHOLE DOCTRINE DOES NOT APPLY.

Wilsons next claim a special rule that an insurer may not seek subrogation in its own name unless the insurer has fully indemnified the insured for all damages for which the wrongdoer could be held liable. Wilson's Br. at 9–11. Wilsons have touched upon an important rule, the made whole doctrine, but have altered the rule substantially by claiming the rule dictates in whose name a subrogation claim must be brought. The made whole doctrine does not dictate when an insurer can bring a subrogation action in its own name. Rather, the made whole doctrine applies in equitable subrogation cases

(subrogation matters where the insurance policy does not set forth contractual terms regarding subrogation) and creates rules for insurers seeking subrogation rights irrespective of whose name the case is brought in.

Wilsons incorrectly argue that the Utah Supreme Court has held an insurer must fully indemnify an insured before it can sue in its own name. *Id.* (*citing State Farm Mut. Auto. Ins. Co. v. Nw. Nat'l Ins. Co.*, 912 P.2d 983 (Utah 1996); *Cook v. Cook*, 174 P.2d 434 (Utah 1946); *Featherstone v. Emerson*, 45 Pac. 713 (Utah 1896); *Davis Cnty. v. Jensen*, 2003 UT App 444, 83 P.3d 405). None of these cases address the issue of whether or not an insurer can sue in its own name, rather, the cited cases are articulations of the made whole doctrine and when it is applicable.[1] Specifically, these cases cited by Wilsons only articulate the rule that a party seeking equitable subrogation must fully indemnify the injured party before seeking subrogation rights. Again, the principle of equitable subrogation is void when the insurance policy dictates terms regarding subrogation. *Hill v. State Farm Mut. Auto. Ins. Co.*, 765 P.2d 864, 866 (Utah 1988) *disapproved of on separate grounds by Sharon Steel Corp. v. Aetna Cas. & Sur. Co.*, 931 P.2d 127 (Utah 1997).

---

[1] In its opinion, the Utah Court of Appeals cites to *Johanson v. Cudahy Packing Co.* for the proposition that an insurer may be able to seek subrogation damages in its own name if it has fully indemnified the insured. *Wilson*, 2016 UT App 38, ¶ 8, 368 P.3d 471. As EMIA discussed in Brief of Appellant, this particular portion of *Johanson* cited by the court of appeals was a review of other jurisdictions' laws that was rejected by the *Johanson* Court. Wilsons counter that the court of appeals was not relying on *Johanson* for its holding, Wilsons' Br. at 11–12, but rather cited *Johanson* for a good review of the general law. *Id.* at 11. Regardless, the view was rejected by the *Johanson* Court and was not addressed in the cases cited by Wilsons. Wilsons' rule that in insurer can seek subrogation rights only after fully indemnifying its insured is not Utah law.

The made whole doctrine is inapplicable in the present case. The Utah Supreme Court has given clear instruction as to when principles of equitable subrogation and contractual subrogation apply. In 1988, the Utah Supreme Court distinguished between equitable and contractual subrogation in *Hill v. State Farm Mutual Auto Insurance Co.*, 765 P. 2d 864. The Utah Supreme Court stated, "[s]ubrogation is an equitable doctrine and is governed by equitable principles. *This doctrine can be modified by contract*, but in the absence of express terms to the contrary, the insured must be made whole before the insurer is entitled to be reimbursed from a recovery from the third-party tort-feasor." *Id.* at 866 (emphasis added). *See also Birch v. Fire Ins. Exch.*, 2005 UT App 395, ¶ 7, 122 P.3d 696 ("The subrogation doctrine can be modified by contract.") In this matter, where there is a contract with express terms to the contrary, equitable subrogation and the made whole doctrine are inapplicable. *See* R. at 624–25 (setting forth contractual subrogation terms). *See generally* R. at 605–85 (setting forth full insurance contract).

While it is clear the present case is based in contractual subrogation, and hence the made whole doctrine does not apply, Wilsons do not attempt to apply the actual rule articulated in the cases they cited. Rather, Wilsons seek to alter the made whole doctrine to create a nonexistent rule restricting in whose name a subrogation action may be brought.

C. UTAH COMMON LAW ALLOWS AN INSURER TO BRING A SUBROGATION ACTION IN ITS OWN NAME, INCLUDING IN WORKERS COMPENSATION CASES.

Wilsons argue that a workers compensation insurer is entitled to bring an action in its own name only because Utah Code allows them to do so. Wilsons' Br. at 11–14.

While modern day statute does specifically allow this right, early workers compensation statutes did not. Rather, the Utah Supreme Court relied on general common law subrogation principles to determine that insurers in workers compensation cases could bring a subrogation action in their own name. *See Johanson*, 152 P.2d at 104 ("when . . . no special rules for maintaining the [subrogation] action are prescribed, the proceeding to enforce the rights gained by subrogation will be controlled by general principles of subrogation as affected by statutes governing pleading.").

Wilsons' analysis of *Johanson*, an early workers compensation case, is incorrect. Wilsons incorrectly claim that 42-1-58, R.S.U. 1933 ("42-1-58"), the statute giving a workers compensation insurer a statutory right to subrogate at the time of the *Johanson* case, was similar in substance to modern day workers compensation statutes in that it expressly authorized a workers compensation insurer to bring a subrogation action in its own name. Wilsons' Br. at 12. However, Wilsons are incorrect.

42-1-58, R.S.U. 1933 reads in full as follows:

> When any injury for which compensation is payable under this title shall have been caused by the wrongful act of a third person, the injured employee, or in case of death his dependents, may at their option claim compensation under this title or have their action for damages against such third person; and, if compensation is claimed and awarded, the employer or insurance carrier having paid the compensation shall be subrogated to the rights of such employee or his dependents to recover against such third person; provided, if such recovery shall be in excess of the amount of the compensation awarded and paid, then such excess, less the reasonable expenses of the action, shall be paid to the employee or his dependents.

42-1-58, R.S.U. 1933. *See also* Addend. A (supplying a copy of statute as it appeared in the Revised Statutes of Utah (1933)). The statutory right afforded by 42-1-58 was the

right to subrogate. Unlike modern day workers compensation statutes, and contrary to Wilsons' assertions, 42-1-58 did not state in whose name the subrogation rights could be pursued.

The *Johanson* Court recognized 42-1-58 did not prescribe the manner in which such a subrogation action should be maintained. The Court noted, "when this right of subrogation was given by statute as it is in Section 42-1-58 and *no special rules for maintaining the action are prescribed*, the proceeding to enforce the rights gained by subrogation *will be controlled by general principles of subrogation* as affected by statutes governing pleading." *Id.* at 104 (emphasis added). The *Johanson* Court held that under Utah's subrogation common law and Utah's real party in interest statute, both the insured and the insurer are real parties in interest, co-owner's of the insured's cause of action, and both may maintain the action in their own name. *Johanson*, 152 P.2d at 104–05.

Those same general, common law subrogation principles apply today like they did back in 1944. While early workers compensation insurers had a statutory right to subrogate, their right to do so in their own name was granted by common law general principles of subrogation.

D. UTAH COMMON LAW ALLOWS AN INSURER TO BRING A SUBROGATION ACTION IN ITS OWN NAME AGAINST BOTH A TORTFEASOR AND THE TORTFEASOR'S INSURER.

Finally, Wilsons claim that Utah common law "carved out a special standing rule allowing insurers to sue other insurers" in their own name. Wilsons' Br. at 15 (claiming the special rule was carved out by the Utah Supreme Court). There is no such special standing rule. The cases cited by Wilsons do mark the articulation of an important

subrogation development in Utah law, but the development has nothing to do with in whose name the subrogation action can be pursued. Rather, the development allowed subrogating insurers to directly sue both the tortfeasor and/or the tortfeasor's insurer.

Wilsons cite to *State Farm Mutual Automobile Insurance Co. v. Northwestern National Insurance Co.* The full quote reads as follows:

> Utah law clearly recognizes an insurer's right to bring a subrogation action on behalf of its insured against a tortfeasor. More significantly, we have extended this principle to an action by an insurer against a second insurance company which is primarily liable to defend or pay any claims on behalf of its insured but which has denied coverage.

State Farm Mut. Auto. Ins. Co. v. Nw. Nat'l Ins. Co., 912 P.2d 983 (Utah 1996) (internal citations omitted). The rule articulated in *State Farm Mutual* is that the subrogation rights an insurer has against a tortfeasor can also be claimed against the tortfeasor's insurer. The rule does not grant an additional right for an insurer to sue another insurer in its own name. An insurer could sue another insurer in its own name because an insurer already had that right against the tortfeasor and that right was extended to the tortfeasor's insurer. The special standing rule, as articulated by Wilsons, simply does not exist.

II. PROCEDURAL AND POLICY CONCERNS IN SUBROGATION ACTIONS.

The court of appeals stated EMIA had alternative routes available to protect EMIA's rights including pursuing its rights through probate and intervening in Wilsons' cause of action. *Wilson*, 2016 UT App 38, ¶ 12, 368 P.3d 471. Wilsons, however, presented conflicting arguments. Wilsons first agreed with the Utah Court of Appeals that EMIA had alternatives in either a probate proceeding or by intervening in the Wilsons' cause of action. Wilsons' Br. at 21–23. But Wilsons then argued that an insurer loses its

subrogation rights if an insured passes away, rearguing their arguments made below at the court of appeals. Wilsons' Br. at 21–23; *see also* Br. of Appellant at 17–18, *Wilson*, 2016 UT App 38, 368 P.3d 471 (arguing Utah's survival statute prevents EMIA from "stand[ing] in the shoes of a dead person."). As The Utah Court of Appeals never reached Wilson's argument that an insurer's rights are extinguished upon the death of their insured, and that issue is not now before the Utah Supreme Court, EMIA will not address that issue here. The issues of a probate proceeding and intervention are each addressed below. EMIA will then briefly address Wilsons' assertions as to the legislative intent behind Utah's subrogation statute.

First, the proposition that an insurer can pursue its rights through probate is problematic. It is unclear if EMIA could have been a personal representative of Ms. Wilson's estate. *See* Utah Code Ann. § 75-3-203(1) (setting forth categories of persons who can be personal representatives and priority of appointment; an insurer may not fit in any of the prescribed categories unless it is a creditor). But, even if EMIA could be viewed as a creditor, it would have had the lowest priority of appointment. *Id.* Most likely, EMIA would be at the mercy of an individual with standing, or a higher priority of appointment, to commence the administration of Ms. Wilson's estate. As noted in EMIA's initial brief, *see* EMIA's Br. at 24–25, this present case illustrates that the interests of the family of the decedent and that of the insurer are often conflicted. A personal representative or family member would have little incentive to assist an insurer if doing so would potentially reduce the amount of assets or funds available for the

family member to receive. *Id.* The probate option is really not available as a practical matter.

Next, the intervention alternative is equally problematic. First, if an insurer cannot instigate a subrogation action in cases such as this, but must wait to intervene in an heir's action, the insurer is at the mercy of the heirs to bring a cause of action before it may protect its subrogation rights. This is at odds with the holding in *Johanson* that, as joint real parties in interest and co-owners of the insured's cause of action, both the insured and insurer may bring the cause of action, and neither is precluded from pursuing the cause of action just because the other party declined to do so. *Johanson,* 152 P.2d at 104–05. Second, the very same arguments Wilsons made that EMIA does not have standing to bring a subrogation case could likewise be raised if EMIA had sought to intervene. As a practical matter, intervention does not insure an insurer's subrogation rights are protected because it may not be available.

There are questions about whether the intervention or probate routes articulated by the Utah Court of Appeals could really have protected EMIA's rights. Under either route, EMIA could not enforce its subrogation rights without the cooperation of Wilsons. As this case has shown, the Wilsons have been adverse to EMIA exercising its rights. Dependence on the Wilsons is not necessary however, as Utah law already allows an insurer to protect its subrogation rights in the manner followed by EMIA.

Finally, EMIA contests the policy articulation made by Wilsons. Without citation, Wilson claim the "strong policy [of] § 31A-21-108 is to prevent the splitting of a cause of action." Wilsons' Br. at 19. Wilsons' provide no basis for this legislative intent assertion.

Like Amicus, *see* Br. of Amicus at 7–9, EMIA searched the legislative history behind enactment of § 31A-21-108, Utah's subrogation statute, but could not find a specific articulation of the legislature's intent in passing the statute. However, the intent of passing such statutes on a national, state-by-state basis is well documented. The purpose behind such statutes granting an insurer the right to bring a subrogation action in the name of its insured is to prevent a jury from discovering that the insured's loss may have been covered by insurance. *See* Daniel W. Coffey, *A Rose by Another Name? Use of the Insured's Name in Subrogation Actions*, NASP SUBROGATOR, Spring/Summer (2004), http://www.subrogation.org/download/article/A-Rose-By-Another-Name_Use-of-the-Insureds-Name-in-Subrogation-Actions.pdf. EMIA recognizes that this national rationale for the state-by-state push for such legislation is persuasive at best as to the Utah legislature's intent in passing § 31A-21-108. For this reason, EMIA has, to this point, refrained from making such inferences. However, with Wilsons articulating a legislative intent without citing any basis, it is important this Court know the policy reason behind a national push for such legislation.

III. RULE 17 OF THE UTAH RULES OF CIVIL PROCEDURE APPLIES.

As EMIA has argued previously, Rule 17 is applicable to this matter and prevented the court of appeals from ordering EMIA's matter be dismissed. Rule 17 states

> *No action shall be dismissed* on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

U.R.C.P. 17(a). (emphasis added). Despite the clear language in Rule 17, in its opinion, the Utah Court of Appeals stated, "We conclude that EMIA lacked standing to pursue a subrogation action against Krueger in its own name. Thus, the trial court erred in dividing the Wilsons' settlement with EMIA. Accordingly, we reverse the trial court's order and remand *with instructions for the trial court to dismiss EMIA's claims. . . .*" *Wilson*, 2016 UT App 38, ¶ 13, 368 P.3d 471. (emphasis added). EMIA's ability to bring a subrogation action in its own name is not a standing issue, rather a real party in interest issue governed by Rule 17, making dismissal inappropriate. While EMIA believes it was proper to bring its subrogation action in its own name, even if it could not under the court of appeals' reasoning, EMIA would have had standing had it brought its subrogation action in the name of its insured. *See Wilson*, 2016 UT App 38, ¶ 12, 368 P.3d 471 ("EMIA should have brought its personal injury action in the name of the estate or intervened in the Wilsons' action against Krueger."). The court of appeals should not have dismissed EMIA's claims, even if the wrong party was named.

Despite the above, Wilsons argue Rule 17 of the Utah Rules of Civil Procedure is inapplicable to this matter for three reasons: first, EMIA's case against the tortfeasor was dismissed; second, the right to have the real party in interest substituted belonged to the tortfeasor; and third, EMIA had a reasonable time to substitute the real party in interest. *See* Wilsons' Br. at 24–25. None of these positions are persuasive and each will be dealt with in turn below.

A. THE FACT THAT EMIA'S ACTION AGAINST THE TORTFEASOR WAS DISMISSED IS INCONSEQUENTIAL.

Wilsons first challenge the applicability of Rule 17 of the Utah Rules of Civil Procedure on the basis that EMIA's action against the tortfeasor was dismissed. *See* Wilsons' Br. at 24. Wilsons are correct that after the claims filed by EMIA and the Wilsons were consolidated, the parties stipulated to release and dismiss the tortfeasor from the lawsuit upon the tortfeasor interpleading $100,000—the tortfeasor insurance liability policy limit—with the trial court. R. at 543, 841. However, Wilsons' arguments as to the import of the above are confusing at best. Initially, it should be noted Wilsons cite to no authority for their proposition. Wilsons then go on to assert, "EMIA has standing in this interpleader case to litigate its right to the interpleader funds, but the Court of Appeals directed the trial court to dismiss EMIA from the interpleader action because it lacked standing in the case it filed against Krueger." Wilsons' Br. at 24. Wilsons offer no explanation for the interesting proposition that it would have been appropriate for EMIA to sue in its own name in conjunction with the interpleader portion of the case, but not in the action dealing directly with the liability of the tortfeasor. Nor was this particular distinction made by the court of appeals in its opinion.

B. THE FACT THAT THE TORTFEASOR HAD THE RIGHT TO CHALLENGE THE SUBSTITUTION OF THE ALLEGED REAL PARTY IN INTEREST AND FAILED TO DO SO DOES NOT ADVANCE WILSONS' POSITION.

Next, Wilsons argue Rule 17 is inapplicable because "the right to have the real party in interest substituted into an action" belonged to the tortfeasor. Wilsons' Br. at 24 (citing *Shurtleff v. Jay Tuft and Co.*, 622 P.2d 1168 (Utah 1980)). However, this fact does little to improve Wilsons' position. In *Johanson*, the Utah Supreme Court stated, "The failure on the part of the plaintiffs to make the [missing party] a party plaintiff, or if

it refused to join, make it a party defendant, is at the most a defect in parties plaintiff. Such a defect is waived unless raised." 152 P.2d at 104–05. Clearly, failure to join the missing party is a defect that, unless raised, is waived. *Id.* at 104–05. Under *Johanson*, if the tortfeasor has been dismissed, it would appear that the issue of whether or not EMIA could have brought the suit in its own name or not is waived and should not have served as a basis for dismissing EMIA's claims.

C. EMIA Did Not Have a Reasonable Time to Substitute the Real Party in Interest.

Finally, Wilsons argue EMIA had more than enough time to substitute the real party in interest. *See* Wilsons' Brief at pg. 24–25. While EMIA believes it is the real party in interest and was at all times, even if it were not, Wilsons' proposition is problematic. First, early on in the case, the tortfeasor attempted to dismiss EMIA's action for lack of standing. R. at 783–90. After oral argument, the trial court denied that motion and ruled EMIA did indeed have standing to bring its subrogation action and could properly do so in its own name. R. at 820–22. While EMIA believes and maintains that the determination of the trial court regarding EMIA's ability to bring an action in its own name was correct, even if the trial court ruled incorrectly, Wilsons fault EMIA for not unilaterally overruling the order of the trial court. To require a party to take such an action is inappropriate and nonsensical. Further, Wilsons do not cite to any legal authority for their assertion that such an action is required or appropriate.

Second, no party objected to EMIA being the real party in interest. Rule 17 states,

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed

> *after objection for ratification* of commencement of the action by, *or joinder or substitution* of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

U.R.C.P. 17(a) (emphasis added). While a motion to dismiss was filed challenging EMIA's standing to bring the action, no objection or motion was ever made pursuant to Rule 17 arguing that EMIA was not the real party in interest.

CONCLUSION

Based on the forgoing, the Utah Court of Appeals' decision in this matter should be reversed.

DATED this 9th day of December, 2016.

Randall R. Smart
Jeffrey A. Callister
Chad P. Curtis
Attorneys for Petitioner

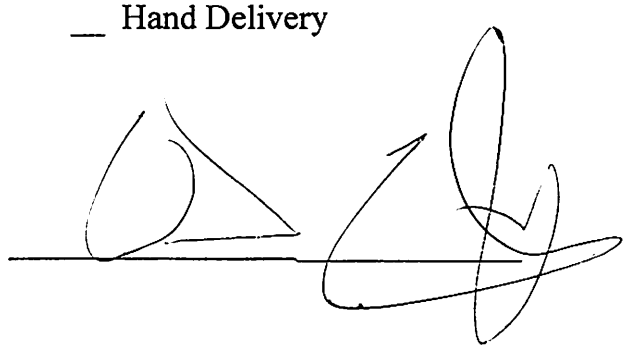
CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of December, 2016, I caused to be served the foregoing REPLY BRIEF OF APPELLANT/PETITIONER upon the parties of record in this proceeding set forth below by the method indicated:

Jack C. Helgesen (1451)
Craig Helgesen (12547)
HELGESEN, HOUTZ & JONES, P.C.
1531 Hill Field Road #3
Layton UT 84015

Attorneys for Appellees/Respondents

__ Electronic Filing
__ Email
__ Facsimile
_X_ U.S. Mail, 1st Class, Postage Prepaid
__ Hand Delivery



ADDENDUM A

When so filed and docketed the award shall constitute a lien from the time of such docketing upon the real property of the employer situated in the county, for a period of eight years from the date of the award unless previously satisfied. Execution may be issued thereon within the same time and in the same manner and with the same effect as if said award were a judgment of the district court.

57—

The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer, except as in this title otherwise declared; *provided*, that where the injury is caused by the employer's willful misconduct and the act causing such injury is the personal act of the employer himself, or, if the employer is a partnership, of one of the partners, or if a corporation, of an elective officer or officers thereof, and such act indicates a willful disregard of the life, limb or bodily safety of employees, such injured employee or other person damaged may, at his option, either claim compensation under this title or maintain an action at law for damages. The term "willful misconduct," as employed in this section shall be construed to mean an act done knowingly and purposely with the direct object of injuring another.

58—

When any injury for which compensation is payable under this title shall have been caused by the wrongful act of a third person, the injured employee, or in case of death his dependents, may at their option claim compensation under this title or have their action for damages against such third person; and, if compensation is claimed and awarded, the employer or insurance carrier having paid the compensation shall be subrogated to the rights of such employee or his dependents to recover against such third person; *provided*, if such recovery shall be in excess of the amount of the compensation awarded and paid, then such excess, less the reasonable expenses of the action, shall be paid to the employee or his dependents.

59—

All judgments obtained in any action prosecuted by the commission or by the state under the authority of this title shall have the same preference against the assets of the employer as claims for taxes.

60—

No compensation shall be allowed for the first three days after the injury is received, except the disbursements hereinafter authorized for medical, nurse and hospital services, and for medicines and funeral expenses.

61—

In case of temporary disability, the employee shall receive 60 per cent of his average weekly wages so long as such disability is total, not to exceed a maximum of $16 per week, and not less than a minimum of $7 per week; *provided*, that where the wage earned at the time of injury is less than $7 per week, the amount of wages earned shall be the amount of compensation to be paid. In no case shall such compensation continue for more than six years from the date of the injury or exceed $5,000.

62—

Where the injury causes partial disability for work, the employee shall receive, during such disability and for a period of not to exceed six years, beginning on the fourth day of disability, a weekly compensation equal to 60 per cent of the difference between his average weekly wages before the accident and the weekly wages he is able to earn thereafter, but not more than $16 per week.

In case the partial disability begins after a period of total disability, the period of total disability shall be deducted from the total period of compensation.

In no case shall the weekly payments continue after the disability ends, or the death of the injured person.

In the case of the following injuries the compensation shall be 60 per cent of the average weekly wages, but not more than $16 per week, to be paid weekly for the periods stated against such injuries respectively, and shall be in addition to the compensation hereinbefore provided for temporary total disability, to wit:

For loss of:

One arm at or near shoulder	200 weeks
One arm at the elbow	180 weeks
One arm between the wrist and the elbow	160 weeks
One hand	150 weeks
One thumb and the metacarpal bone thereof	60 weeks
One thumb at the proximal joint	30 weeks
One thumb at the second or distal joint	20 weeks
One first finger and the metacarpal bone thereof	30 weeks
One first finger at the proximal joint	20 weeks
One first finger at the second joint	15 weeks
One first finger at the distal joint	10 weeks
One second finger and the metacarpal bone thereof	30 weeks
One second finger at the proximal joint	15 weeks
One second finger at the second joint	10 weeks
One second finger at the distal joint	5 weeks
One third finger and the metacarpal bone thereof	20 weeks
One third finger at the proximal joint	12 weeks
One third finger at the second joint	8 weeks
One third finger at the distal joint	4 weeks
One fourth finger and the metacarpal bone thereof	12 weeks
One fourth finger at the proximal joint	9 weeks
One fourth finger at the second joint	6 weeks
One fourth finger at the distal joint	3 weeks
One leg at or so near the hip joint as to preclude the use of an artificial limb	180 weeks
One leg at or above the knee where stump remains sufficient to permit the use of an artificial limb	150 weeks
One leg between the knee and ankle	140 weeks
One foot at the ankle	125 weeks
One great toe with the metatarsal bone thereof	30 weeks